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No. 94-1573

In The

Supreme Court of the United States

October Term, 1994

BILLIE J. COMER, as Personal Representative of the Estate of Ryan Comer,

Petitioner,

vs.

KAISER FOUNDATION HEALTH PLAN, INC.; THE PERMANENTE MEDICAL GROUP, INC.; KAISER FOUNDATION HOSPITALS, INC. and DOES 1-50,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Are state law wrongful death actions which arise from the denial of benefits pursuant to the terms of an ERISA welfare benefit plan preempted by ERISA?

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APPENDIX

Appendix A — Memorandum of the United States Court of Appeals for the Ninth Circuit, Filed December 23, 1994 ..... 1a

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OPINION BELOW

Petitioner failed to attach the complete memorandum ("Order") of the Court of Appeals. A complete copy is attached hereto in Appendix A at pages 1a-4a.

ADDITIONAL STATUTE INVOLVED

Section 3(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(1) is reproduced hereto in Appendix B at page 5a.

Respondents Kaiser Foundation Health Plan, Inc. ("Health Plan"), The Permanente Medical Group, Inc. ("Medical Group"), and Kaiser Foundation Hospitals (collectively, "Kaiser") respectfully request that this Court deny the Petition For Writ Of Certiorari submitted by petitioner Billie J. Comer because applicable law has settled the issue. Prior decisions in the circuits below have held that ERISA preempts wrongful death claims which arise from the denial of employee welfare plan benefits. The overwhelming circuit authority concludes that such claims are preempted even though they are directed at the parties who render the medical advice that is the basis for the denial of plan benefits.

STATEMENT OF THE CASE

Respondents are compelled herein to correct petitioner's misrepresentations and serious omissions pursuant to this Court's Rule 15.

Petitioner erroneously portrays this case as though the court below extended ERISA preemption to common law wrongful death actions against health providers for medical malpractice. In fact, the purported medical negligence was the medical

judgment that the requested autologous bone marrow transplantation procedure ("ABMT") was experimental and therefore excluded from coverage pursuant to the terms of the Group Medical and Hospital Service Agreement entered into between respondent Health Plan and petitioner's employer, AT&T ("AT&T Service Agreement"). As discussed below, this agreement is an integral part of an employee welfare benefit plan. Respondent Health Plan is explicitly named as an ERISA fiduciary in the AT&T Service Agreement for purposes of claims administration, and the challenged medical advice was given for the purpose of determining the claim for coverage that petitioner made on behalf of her son.

The Court of Appeals, relying on its prior holding in *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129 (9th Cir.), *cert. denied*, __U.S. __, 114 S. Ct. 1612 (1994), affirmed the trial court's summary judgment ruling in favor of respondents. The claim was dismissed on the ground that petitioner's claims were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*

Summary of Facts

Petitioner Billie J. Comer is the mother of decedent Ryan Comer. Ryan was a member of Health Plan, a non-profit health maintenance organization ("HMO"), through petitioner's AT&T employee benefit plan. It is undisputed that Health Plan and AT&T entered into the AT&T Service Agreement under which Health Plan undertook to arrange for health care services and benefits for petitioner and other AT&T employees and their eligible dependents. (AOB at 4:22-24, 8:17-18, and 9:1-5.)[1]

1. "AOB" refers to petitioner's opening brief in the Court of Appeals; "CR" refers to the trial court's Clerk Docket Record; "Compl." refers to petitioner's Complaint; "GN" refers to petitioner's attachment to the Complaint.

Petitioner enrolled Ryan as a dependent member under the AT&T Service Agreement by virtue of petitioner's employment with AT&T. (CR 23, 9:1-5.)

As a health maintenance organization ("HMO"), Health Plan does not provide medical or hospital services. (CR 15, 2:21-28.) Rather, Health Plan contracts with The Permanente Medical Group, Inc., a professional corporation, for the rendition of physician services. *Id.* Health Plan likewise contracts with Kaiser Foundation Hospitals ("Hospitals"), a separate non-profit corporation, which operates the hospitals and other facilities where members receive medical care. *Id.*

Petitioner's complaint alleges two causes of action for wrongful death and general negligence arising from Ryan's death as a result of a rare cancer known as Rhabdomyosarcoma. (AOB at 4:9.) Both causes of action are centered on the allegation that Ryan's death was the proximate result of respondents' "failing to provide promised insurance benefits." (CR 1, Compl. ¶ 7.) The insurance benefits in dispute are alleged to be based on Ryan's "group medical coverage" as a Health Plan member. (CR 1, Compl. Attach. GN-1, p. 6.)

In particular, the Complaint alleges that petitioner requested that respondents cover the cost of a certain ABMT therapy for Ryan which was being offered at two hospitals in the Midwest. (CR 1, Compl. attach. GN-1, p. 6.) Petitioner further alleges that respondents denied the requested coverage "because ABMT was considered experimental treatment." *Id.*

The undisputed record below established that Health Plan denied coverage for the requested ABMT therapy because it came within the AT&T Service Agreement's exclusion for experimental services contained in Section 6-A(6) of the Service Agreement. (CR 15, Exh. 3.) This provision states, in pertinent part:

> **(6) Experimental or Investigational Services.** Any Service that Health Plan, *after consultation with Medical Group,* determines to be experimental or investigational. A Service is experimental or investigational if:
>
> > (a) The Service is not recognized in accord with generally accepted medical standards as safe and effective for treating the condition in question, whether or not the Service is authorized by law for use in testing or other studies on human subjects[.]

[Emphasis added.] (*Id.* at 6-7.) Health Plan's conclusion that the ABMT procedure was experimental was based on the advice of Medical Group's Bone Marrow Transplantation Advisory Board. (CR 16, Exh. 2.)

Petitioner's characterization of the case below as a garden variety medical malpractice case has no basis in the record.[2] The Court of Appeal found that petitioner did not sue Kaiser for medical malpractice, but rather because of Health Plan's denial of plan benefits based on the exclusion for experimental procedures. (Order at p. 3a.)

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2. Petitioner filed a separate state court law suit for wrongful death based on general allegations of medical malpractice that did not allude to the coverage dispute under the AT&T Service Agreement. (Alameda County Superior Court Action Number V-005097-1) This separate malpractice action was dismissed by the state court for lack of prosecution.

REASONS FOR DENYING THE PETITION

I.

THE PETITION DOES NOT SATISFY THE CRITERIA FOR CERTIORARI REVIEW.

Petitioner cannot meet the "special and important reasons" requirements of this Court's Rule 10. There is no justification for certiorari review in light of the true character of petitioner's claims.

Petitioner characterizes the decision below as a ruling of first impression. The court below, however, did not undertake a bold extension of ERISA preemption. Rather, the Court of Appeals' holding fully comports with the well established principles of ERISA preemption. (*See* Part II, below.)

The court below joined an unbroken line of circuit authority from within and outside the Ninth Circuit in holding that wrongful death actions are preempted if they arise from the denial of ERISA plan benefits. (*See* Part III, below.) Petitioner's claim that this Court must intervene to resolve a conflict of authority is false.

Furthermore, petitioner's thesis that the decision below deprives her of remedies for wrongful death is a gross overstatement. ERISA does provide her with limited remedies albeit not the remedies that she seeks. (*See* Part IV, below.) In arguing for the right to recover state law tort damages, petitioner is asking the federal courts to rewrite ERISA's carefully circumscribed remedial scheme. The federal courts cannot undo the remedial plan that Congress chose to adopt. Moreover, this Court has held that Congress' remedial scheme is exclusive.

II.

THE DECISION BELOW FULLY COMPORTS WITH THE WELL SETTLED PRINCIPLES OF ERISA PREEMPTION.

Petitioner contends that the Ninth Circuit's finding of ERISA preemption was erroneous on the grounds (1) that she is not litigating this case as an ERISA plan participant/beneficiary, (2) the action does not implicate an ERISA plan since Kaiser is not an ERISA plan and/or fiduciary and (3) that this is not a claim for plan benefits. Each contention is refuted by the record and the controlling case law.

Petitioner's action does not arise from the breach of state law duties with respect to medical negligence. To the contrary, petitioner's claims were centered on the allegation that respondents erroneously determined that the requested ABMT therapy was subject to the AT&T Service Agreement's exclusion for experimental procedures.

For the reasons set forth below, petitioner's claims are preempted because they are inextricably bound to the terms of the AT&T Service Agreement and because they conflict with ERISA's exclusive remedial scheme.

A. The AT&T Service Agreement Is An Integral Part Of An Employee Welfare Benefit Plan.

Petitioner has conceded that her employer sponsored an employee welfare benefit plan governed by ERISA. (AOB at 8:17-18). The AT&T Service Agreement between Mrs. Comer's employer AT&T, and respondent Health Plan, is a vehicle by which AT&T furnishes health care coverage to its employees and their dependents. Section 3(1) of ERISA, 29 U.S.C. § 1002(1)

explicitly states that an employee welfare benefit plan may be maintained "through the purchase of insurance or otherwise." It is well settled that an agreement between an employer and an HMO whereby the HMO furnishes health care coverage to the employer's employees constitutes an ERISA employee welfare benefit plan. *E.g., Barnett v. Kaiser Foundation Health Plan, Inc.*, 32 F.3d 413, 415 (9th Cir. 1994); *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192 (10th Cir. 1992); *Anderson v. Blue Cross/Blue Shield of Alabama*, 907 F.2d 1072 (11th Cir. 1990).

The AT&T Service Agreement is therefore an integral part of an employee welfare benefit plan governed by ERISA.

B. ERISA Preempts Petitioner's State Law Claims Because They Relate To The AT&T Employee Welfare Benefit Plan.

1. The "Relate To" Standard of Section 514(a) of ERISA

Section 514(a) of ERISA expressly preempts "any and all state laws insofar as they may now or hereafter *relate to* any employee benefit plan." 29 U.S.C. §1144(a) (emphasis added). This Court has emphasized that ERISA's preemption clause is "conspicuous for its breadth." *FMC Corporation v. Holliday*, 498 U.S. 52, 111 S. Ct. 403, 407 (1990). Moreover, this Court has repeatedly held that the phrase "relate to" must be given a "broad common sense" meaning. In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478 (1990), this Court stated:

> A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to a plan. [citation omitted] Under this "broad common-sense meaning," a state law may "relate to" a benefit plan, and thereby be pre-

> empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. [citations omitted]

498 U.S. at 139, 111 S.Ct. at 483. The preemptive effect of section 514(a) reaches state common law contract and tort claims as well as claims based on state statutes or regulations. *E.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48, 107 S. Ct. 1549 (1987); 29 U.S.C. § 1144(c)(1). This Court has "repeatedly stated that a law 'relates to' a covered employee welfare benefit plan for purposes of section 514(a) 'if it has a connection with or reference to such a plan.'" *District of Columbia v. Greater Washington Bd. of Trade*, __ U.S. __, __, 113 S. Ct. 580, 583 (1992) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)).

This Court has consistently held that state law claims are preempted if they expressly refer to and depend on the existence of an ERISA plan regardless of whether the claim affects the substantive terms of the plan. Thus, in *Ingersoll-Rand, supra*, an employee alleged that he was discharged because the employer wished to avoid making pension contributions on his behalf. The employee argued that section 514(a) should be limited to state laws which regulate the terms or conditions of ERISA plans. However, the Court held that preemption was required because:

> The [state law] cause of action makes specific reference to, and indeed is premised on, the existence of a pension plan . . . Thus, in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment. Because the court's inquiry must be directed to the plan, this judicially created cause of action "relates to" an ERISA plan.

498 U.S. at 140, 111 S. Ct. at 483.

2. Petitioner's State Law Causes Of Action Relate To And Depend On The AT&T Service Agreement

The courts below found that petitioner's claims "relate to" the AT&T Service Agreement within the meaning of section 514(a) of ERISA because they expressly referred to the AT&T Service Agreement. Petitioner's causes of action proceed from the alleged premise that her son, Ryan, "had group medical coverage through [respondents], as a dependent of his mother." (CR 1, Compl., ¶ 6 and Attach. GN-1, p. 6.) Both causes of action allege that Ryan's death was the proximate result of respondents having denied Ryan "promised insurance benefits" in the form of coverage for the requested ABMT therapy under the group agreement. (CR 1, Compl., ¶ 7 and Attach. GN-1, p. 6.) The Complaint further alleges that this denial of coverage was based on respondents' opinion that the requested ABMT therapy was "experimental" (CR 1, Compl., Attach. GN-1, p. 6) — an obvious reference to the AT&T Service Agreement's express exclusion for experimental medical services.

Because it is indisputable that the group health coverage in question is Ryan's coverage as a dependent member under the AT&T Service Agreement, both causes of action directly and expressly refer to the AT&T Service Agreement and the denial of requested benefits. Therefore, they are preempted under section 514(a) of ERISA.[3]

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3. Petitioner erroneously relies upon *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825 (1988). In *Mackey*, this Court found that mere collection efforts targeted at plan participants affected the plan in a too tenuous, remote or peripheral manner to warrant a finding that it related to the ERISA plan. *Id.* at 841.

C. In The Alternative, Petitioner's Requested Relief Conflicts With ERISA's Exclusive Remedial Scheme.

Apart from the applicability of section 514(a), state law tort claims relating to the administration of claims under an ERISA plan are preempted on the independent ground that they collide with the exclusive remedies set forth in section 502(a) of ERISA, 29 U.S.C. § 1132(a). *E.g., Pilot Life, supra,* 481 U.S. at 52; *Kanne v. Connecticut General Life Ins. Co.,* 867 F.2d 489, 494 (9th Cir. 1988), *cert. denied,* 492 U.S. 906 (1989). The same impermissible conflict is presented by petitioner's claims herein. As in *Pilot Life* and *Kanne*, petitioner is seeking punitive and other extracontractual damages (CR 1, Compl., ¶ 11) which, if recoverable, would undermine the remedial scheme of section 502(a) which excludes such damages.

D. The Claims Against Respondents Medical Group and Hospitals Inextricably Relate To Health Plan's Administration Of The AT&T Service Agreement And Are Therefore Preempted.

Unlike respondent Health Plan, respondents Medical Group and Hospitals are not named fiduciaries under the AT&T employee welfare benefit plan. All of the asserted claims against them, however, are nonetheless preempted by ERISA because such claims are predicated on the allegation that they joined with respondent Health Plan in wrongfully denying benefits. (CR 1, Compl., Attach. GN-1, p. 6.) *E.g., Custer v. Pan American Life Ins. Co.,* 12 F.3d 410, 418-19 (relying on *Mertens v. Hewitt Assocs.*, __ U.S. __, 113 S.Ct. 2063 (1993)); *Gibson v. Prudential Ins. Co. of America,* 915 F.2d 414 (9th Cir. 1990). Moreover, petitioner is not claiming that Medical Group or Hospitals had any duty to her or Ryan outside of the AT&T Service Agreement.

Preemption under section 514 of ERISA does not turn on

whether a defendant is a party to the plan agreement or an ERISA fiduciary. In *Gibson, supra,* the plaintiff alleged state law claims against a doctor, a professional appointment service, and other defendants who allegedly participated in a scheme to deny the plaintiff coverage under a group disability benefit policy. None of the *Gibson* defendants were parties to the plan or plan fiduciaries. The *Gibson* defendants, like respondents herein, would have had no relationship to the plaintiff except for the plan and the claim for benefits under the plan. Thus, the court ruled that the claims against these parties were preempted because they "related to" the ERISA plan under section 514(a) of ERISA. 915 F.2d at 417. Likewise, the court in *Custer, supra,* concluded that the preemption analysis turns on whether the claims "relate to" an employee benefit plan and not on the defendant's status. *Custer,* 12 F.3d at 419.

The same conclusion must be reached with respect to respondents Medical Group and Hospitals. Both causes of action against these respondents explicitly refer to and depend upon the terms of the AT&T employee welfare benefit plan. Although not parties to the AT&T Service Agreement (GN-1, p. 6, ¶ 1), this joint liability is further demonstrated by the fact that petitioner refers to Medical Group, Hospitals and Health Plan jointly under the common name "KAISER" (GN-1, p. 6, ¶ 1). Therefore, the claims against Medical Group and Hospitals satisfy the "relate to" test of section 514(a) of ERISA and are preempted.

As further discussed in part III below, several circuits have held that state law claims against medical providers based on the providers' decisions affecting a plaintiff's coverage under the ERISA plan are preempted. These decisions reinforce the *Gibson* holding and the conclusion that ERISA preempts the claims against all three respondents herein.

III.

THE DECISION BELOW FOLLOWS THE UNIFORM BODY OF CIRCUIT DECISIONS WHICH HOLD THAT ERISA PREEMPTS WRONGFUL DEATH CLAIMS ARISING FROM THE WRONGFUL DENIAL OF HEALTH CARE COVERAGE.

Petitioner attempts to mislead this Court into believing that the ruling below generally extends ERISA preemption to all wrongful death actions. She characterizes Kaiser's coverage determination as run-of-the mill medical negligence in an attempt to argue that the court below erroneously expanded the scope of ERISA preemption.

A. State Law Wrongful Death Claims Are Not Exempt From ERISA Preemption.

Prior attempts to foist extra contractual tort liability on an ERISA coverage claim have failed. In *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir.), *cert. denied*, 454 U.S. 968 (1992), defendant United Healthcare denied coverage for Mrs. Corcoran's in-patient hospital stay. In the course of denying plan benefits, United HealthCare performed a type of cost-containment service known as utilization review for the ERISA plan. Mrs. Corcoran was a pregnant woman who was denied an in-patient hospital stay. She was sent home and the fetus subsequently went into distress and died.

The *Corcoran* plaintiffs brought a wrongful death action under state law alleging that the unborn child died as a result of negligence. The Fifth Circuit affirmed the lower court's holding which

> . . . found that the state law claim advanced by

> the Corcorans "related to" the employee welfare benefit plan (citing the statutory preemption clause, ERISA §514(a)), and therefore was pre-empted, because "*[b]ut for the ERISA plan,* the defendants would have played no role in Mrs. Corcoran's pregnancy; the sole reason the defendants had anything to do with her pregnancy is because the terms of the ERISA plan directed Mrs. Corcoran to the defendants . . . for approval of coverage of the medical care she initially sought."

Id. at 1325 (Emphasis added).

The *Corcoran* facts are strikingly similar to those alleged by petitioner. For example, Ryan Comer was directed to respondents by the terms of the AT&T employee benefit plan. Moreover, respondents and the *Corcoran* defendants gave medical advice but they did so for the purpose of determining whether the requested procedure was a covered benefit.[4] *Id.* at 1331-1334. This indisputable fact is all that is required to bring petitioner's wrongful death claim within the broad reach of ERISA preemption.[5]

More recently, the Sixth Circuit also held that ERISA preempted a wrongful death claim arising from the wrongful denial of health care coverage. *Tolton v. American Biodyne, Inc.,*

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4. In affirming the lower court's summary judgment ruling, the Fifth Circuit found that although plaintiffs' claims did not explicitly refer to or were premised on an ERISA plan, the negligence-based causes of action had a sufficient relation to the ERISA plan to warrant preemption. *Id.* at 1334.

5. Petitioner's counsel conceded during the summary judgment hearing that there was not much of a difference between *Corcoran* and this case. (CR 23, 10:13-14.)

48 F.3d 937, 1995 U.S. App. LEXIS 4083 (6th Cir. March 3, 1995). The *Tolton* plaintiffs brought a wrongful death action which alleged medical malpractice and other causes of action against the health plan, the hospital as well as the doctors.

As in *Corcoran*, the *Tolton* decedent was denied health care coverage pursuant to a medical care utilization review. He later committed suicide. In ruling that the claims for medical malpractice and wrongful death were preempted by ERISA, the Sixth Circuit held that the claims arose from defendants' refusal to authorize psychiatric benefits pursuant to the terms of the plan. *Tolton*, 1995 U.S. App. LEXIS 4083 at 11. Therefore, the Sixth Circuit ruled that the wrongful death and other state law claims were well within ERISA's preemptive reach. *Id.*

The Eighth Circuit reached the same conclusion. *Kuhl v. Lincoln National Health Plan of Kansas City, Inc.*, 999 F.2d 298 (8th Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 694 (1994). There, the plaintiffs brought a medical malpractice action against the ERISA plan's HMO. The Court of Appeals ruled that the plaintiffs' state law claims for medical malpractice were preempted because they arose from the administration of benefits under the employee benefit plan. *Kuhl*, 999 F.2d at 302-303. Although the *Kuhl* family did not file a wrongful death action, they challenged the defendant HMO's medical advice to deny coverage. The HMO advised against covering Mr. Kuhl's proposed heart surgery and therefore it was then canceled. After further consultation and delays, the HMO eventually authorized the surgery. However, Mr. Kuhl's condition deteriorated. His only alternative was to wait for a heart transplant. Mr. Kuhl died while waiting for a suitable organ.

In affirming the District Court's summary judgment ruling, the Eighth Circuit ruled that the medical malpractice claims were preempted because they arose from the HMO's administration of

ERISA plan benefits and not medical malpractice. *Id.* The *Kuhl* plaintiffs, like Mrs. Comer, suggested that the alleged misconduct went beyond the mere administration of plan benefits. *Id.* However, the Court of Appeals agreed with the trial court's determination that characterizing the HMO defendant's actions as malpractice does not change the fact that the claims were based on the improper administration of a claim for plan benefits. *Id.* at 303.

The Tenth Circuit, in *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505 (10th Cir. 1991), has likewise ruled that state law wrongful death claims relating to the denial of coverage for ERISA plan benefits are preempted. The *Settles* defendant terminated Mr. Settles' health insurance coverage effective October 7, 1986. Subsequently on October 24, 1986, Mr. Settles suffered a heart attack and died five days later. Mr. Settles' widow brought a wrongful death action, alleging that Mr. Settles died as a direct consequence of the termination of insurance coverage. *Id.* at 509. The Tenth Circuit concluded that the allegations related to the employee benefit plan and accordingly ruled that the wrongful death claim was preempted.

Another Ninth Circuit panel had addressed a very similar wrongful death claim in *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129, (9th Cir.), *cert. denied*, __ U.S. __, 114 S.Ct. 1612 (1994). Like petitioner herein, Mrs. Spain and other heirs sued under California's wrongful death statute and asserted allegations that directly related to the administration of an employee welfare benefit plan. The *Spain* plaintiffs did not sue for benefits under the plan, but sought damages flowing from the allegation that the insurer negligently denied ABMT coverage. The *Spain* court found that the cause of action for wrongful death was preempted because it was inextricably connected with the administration of ERISA plan benefits. *Id.* at 131.

As in *Corcoran, Settles, Tolton and Spain,* petitioner's claims herein are intertwined with and dependent on the coverage provisions of the AT&T Service Agreement and respondents' denial of benefits based on those provisions. Absent Ryan Comer's alleged entitlement to coverage for the requested ABMT therapy, the liabilities alleged in the present case would not exist. Petitioner's state law wrongful death claims are therefore preempted.

IV.

IN ARGUING THAT ERISA'S REMEDIES ARE INADEQUATE, PETITIONER IS QUARRELING WITH A CONGRESSIONAL JUDGMENT THAT THE FEDERAL COURTS CANNOT OVERRULE.

Petitioner's thesis that respondents have a "license to kill" with impunity is rhetorical hype. Congress has provided petitioner with remedies, albeit not the state tort remedies she prefers.

A. This Court Has Clearly Ruled That Congress Intended to Provide Limited Remedies.

Contrary to petitioner's thesis, the absence of wrongful death damages do not corrupt the purpose of ERISA.[6] ERISA's remedial scheme does not allow for any extracontractual damages including wrongful death damages. The fact that Congress failed to provide for these damages leads to the

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6. Both Mrs. Comer and the *Tolton* plaintiff mistakenly rely on *Perry v. PIE Nationwide Inc.*, 872 F.2d 157 (6th Cir. 1989), *cert. denied*, 439 U.S. 1093 (1990), for the proposition that ERISA does not preempt state law if ERISA does not provide a remedy for the alleged wrong. In fact, *Perry* reaffirmed this Court's conclusion that ERISA's remedies are exclusive. *Perry*, 872 F.2d at 161.

conclusion that Congress specifically intended to limit relief to certain delineated remedies. Moreover, Congress' remedial scheme would be completely undermined if claimants were able to obtain remedies under state law that Congress rejected in ERISA. *Pilot Life,* 481 U.S. at 54. Indeed, this Court has explicitly stated, "[t]he six carefully integrated civil enforcement provisions found in §502(a) of the statute . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Mass. Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 146 (1985). The ERISA wrongful death precedents discussed above have simply followed this Court's determination that Congress intended ERISA's civil enforcement scheme to be exclusive.

B. Contrary to Petitioner's Assertions, ERISA Does Afford Her Remedies For The Alleged Wrong Although Not The Extracontractual Remedies That She Seeks.

ERISA does provide petitioner and similarly situated plaintiffs with a remedy. Petitioner, as in other cases involving contested experimental procedures, could have sought a declaratory judgment and a preliminary injunction while Ryan was still alive, which, if granted, allows the patient to undergo the disputed procedure at the insurer or benefit plan's expense. *E.g., Tolton,* 1995 U.S. App. LEXIS 4083 at 16, n. 4; *Pirozzi v. Blue Cross-Blue Shield of Virginia,* 741 F. Supp. 586 (E.D. Va. 1990). Alternatively, petitioner could have brought an action for reimbursement for the cost of the disputed experimental procedure under section 502(a) of ERISA. *Tolton,* 1995 U.S. App. LEXIS 4083 at 16, n. 4. If she prevailed under either claim she would also recover her attorneys' fees. 29 U.S.C. § 1132 (g).

Although the issue is not germane to ERISA's preemption of petitioner's claims, petitioner clearly had standing to sue for the aforementioned remedies under section 502(a) because she

herself was a participant under the AT&T plan. *Id.* Petitioner is therefore in the same posture as the plaintiff in *Pilot Life, supra,* in that she could have pursued claims under ERISA's exclusive remedial scheme. Under section 502, her remedies included "Relief [in] the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits." *Pilot Life,* 481 U.S. at 53. Petitioner's preference for state tort damages as a remedy for this alleged wrong is beside the point since ERISA preemption is determined on the basis of the nexus between the alleged wrongful conduct and the ERISA plan.

Petitioner contends that she only seeks tort damages from respondents and that her action will have no financial impact on the AT&T plan. The lower courts have readily rejected such naivete, recognizing that the cost of extra contractual tort liability would ultimately be borne by the employers who sponsor ERISA welfare plans. *E.g., Holmes v. Pacific Mutual Life Insurance Co.,* 706 F. Supp. 733, 736 (C.D. Cal. 1989).

Despite petitioner's disagreement with Congress' judgment, the fact remains that Congress made a carefully considered decision to devise a comprehensive, albeit limited set of statutory remedies for the wrongful denial of ERISA plan benefits. In sum, ERISA preemption does not turn on whether ERISA affords a complete remedy for the alleged wrong. If it did, then the line of cases including this Court's opinion in *Massachusetts Mutual Life Ins., supra,* which confirm the unavailability of extracontractual damages under ERISA, must also be overruled. Indeed, if petitioner's claims are not preempted, the exclusive, uniform remedy intended by Congress would be undermined by lawsuits brought by the spouses and children of *living* plan participants for loss of consortium as well as lawsuits for the alleged wrongful death of deceased participants.

CONCLUSION

On the basis of the foregoing, respondents respectfully ask that the Court deny the petition for certiorari.

Respectfully submitted,

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APPENDIX A

MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 23, 1994

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16054

D.C. No. CV-92-03755-EFL

MEMORANDUM*

BILLIE J. COMER,

Plaintiff-Appellant,

v.

KAISER FOUNDATION HEALTH PLAN, INC. PERMANENTE MEDICAL GROUP, INC.; KAISER FOUNDATION HOSPITALS, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding
Submitted December 14, 1994**
San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Appendix A

Before: BOOCHEVER, NORRIS, and HALL, Circuit Judges

This action arises from the death of Ryan Comer after defendants Kaiser Foundation Health Plan, et al. ("Kaiser") denied him benefits coverage for a cancer treatment. Ryan's mother, Billie Comer, brought a suit against Kaiser for wrongful death in state court. Kaiser removed the case, and the district court granted summary judgment for Kaiser on the grounds that the action was preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq. Comer appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

Ryan Comer had health and major medical coverage as a dependent of his mother, plaintiff Billie Comer, who was an employee of AT&T and a member of AT&T's group medical plan. AT&T and Kaiser entered into the Group Medical and Hospital Service Agreement, which provided that Kaiser would render physician and other medical services to AT&T group medical plan members, including Billie Comer and her son, Ryan.

Ryan was diagnosed with a rare form of pediatric cancer. His mother requested that Kaiser administer a particular treatment for that cancer, high dose chemotherapy with an autologous bone marrow transplant. Kaiser denied coverage for the treatment on the grounds that it was "experimental" and, as such, was not covered under the terms of the Group Medical and Hospital Service Agreement which explicitly excluded coverage for experimental treatments. Subsequently, Ryan died.

Comer brought this wrongful death suit against Kaiser, alleging that Kaiser's denial of benefits coverage for the cancer treatment proximately caused her son's death. This appeal raises

the question of whether ERISA preempts a wrongful death suit against a Health Maintenance Organization for its refusal to approve benefits pursuant to a service agreement arranged with an employer.

ERISA broadly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). In general, state law tort actions relating to the administration of claims under ERISA are preempted. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987). Comer argues, however, that the action does not arise under ERISA and is not preempted by its requirements. Comer argues that she is not bringing this action as a plan participant or beneficiary, and does not claim plan benefits. She points out that AT&T is not a defendant, and argues that the action, therefore, does not implicate the ERISA plan established by AT&T.

We disagree. Comer did not sue Kaiser for medical malpractice. Rather, Comer sued Kaiser precisely because Kaiser determined that her son was not entitled to coverage for the cancer treatment under the Group Medical and Hospital Service Agreement. This service agreement is an integral part of AT&T's group medical plan. As such, an action challenging a decision pursuant to that agreement "relate[s] to an[] employee benefit plan" and is preempted. 29 U.S.C. § 1144(a).

We hold that *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1612 (1994), is controlling authority in this case.[1] In *Spain*, we held that a state cause of

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1. Comer's attempt to distinguish *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1612 (1994), is unavailing. Supp. Letter Br. at 1-2. Comer's real argument is with *Spain*, *see id.*, which this panel is not at liberty to overrule.

action for wrongful death seeking damages for a plan administrator's alleged improper withdrawal of coverage for a cancer treatment was preempted by ERISA. 11 F.3d at 131-32. This similar action for wrongful death seeking damages for a Health Maintenance Organization's refusal to approve coverage pursuant to a service agreement is therefore preempted as well. That ERISA does not ordinarily authorize suits for compensatory or punitive damages, *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2068 (1993), does not affect our preemption analysis. *Spain,* 11 F.3d at 132.

Comer alternately argues that remedies for wrongful death damages must be engrafted onto ERISA in "a body of ERISA common law" in order to effectuate congressional intent. Bl. Br. at 18. We have declined to create federal common law causes of action which are inconsistent with the exclusive remedies established by ERISA. *See, e.g., Kim v. Fujikawa,* 871 F.2d 1427, 1432 (9th Cir. 1989) (refusing to engraft a cause of action for contribution onto ERISA). While federal common law can be created to fill a void which Congress forgot to address, *e.g., Kunin v. Benefit Trust Life Ins. Co.,* 910 F.2d 534, 539 (9th Cir.), *cert. denied,* 498 U.S. 1013 (1990), no such void exists with respect to relief under ERISA. ERISA authorizes suits by beneficiaries against fiduciaries for "appropriate equitable relief" only, 29 U.S.C. § 1132(a)(3)(B), and we decline to read alternate remedies into this explicit provision.

AFFIRMED.

APPENDIX B

ADDITIONAL STATUTE INVOLVED

Section 3(1) of the Employee Retirement Income Security Act, 29 U.S.C. § 1002(1).

SUBTITLE A - GENERAL PROVISIONS

DEFINITIONS

Sec. 3. For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).